## IN THE SUPREME COURT STATE OF MISSOURI

#### No. SC 84107

## MISSOURI HOTEL AND MOTEL ASSOCIATION, et al.

Appellants/Cross-Respondents

v.

CITY OF ST. LOUIS, et al.

**Respondents/Cross-Appellants** 

# Appeal from the Circuit Court of the City of St. Louis, Missouri The Honorable Robert H. Dierker **Division 3**

### APPELLANT'S BRIEF

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# JURISDICTIONAL STATEMENT

This Court has jurisdiction under Article V, Section 3 of the Missouri Constitution in that the validity of a statute, Section 67.1571, RSMo, is in question as being held unconstitutional by the trial court in this case.

#### STATEMENT OF FACTS

On August 8, 2000, the voters of the City of St. Louis enacted a "Living Wage" Ordinance. (L.F. 36-37). This Ordinance purports to compel all persons who have contracts with or who receive any type of economic development financial aid from the City of St. Louis over certain threshold amounts to pay their employees at or above a minimum "living wage." (L.F. 34-35). This wage, based upon the Ordinance, is \$8.84 if "full" health care benefits are paid; or an adjusted amount of \$10.76, based upon United States Federal Government calculations, if the employer does not provide "full" health insurance. Ordinance 65045, Section 3(b) and (c). (L.F. 35).

The Appellant in this case is Associated Industries of Missouri, who represents businesses of all types within the City of St. Louis who either have contracts with the City or receive some type of economic development financial aid from the City which would subject them to the requirements of Ordinance 65045. (L.F. 3). Appellant filed suit in the Circuit Court of the City of St. Louis, asserting that the St. Louis Living Wage Ordinance violates the statutory prohibition in Section 67.1571, RSMo 2000, on local governments imposing a minimum wage above the state minimum wage. Petitioners also asserted that the St. Louis Living Wage Ordinance violated the provisions of Article V of the Missouri Constitution (the Judicial Article); that it violated Article I, Section 13 of the Missouri Constitution by interfering with the right of contract and granting special immunities and privileges; that the terms of the St. Louis Living Wage Ordinance were unconstitutionally vague, incapable of interpretation and, therefore, were in violation of Article I, Section 10 of the Missouri

Constitution; that Ordinance 65045 is a prohibited taking of property under Article I, Section 10 of the Missouri Constitution; and that Ordinance 65045 violates the equal protection clause of the Missouri Constitution, Article I, Section 2. (L.F. 17-24, 26-28).

On January 9, 2001, the Court held a trial on the merits of the case, at which numerous intervenors were granted intervention, including Intervenor Living Wage Campaign, a Respondent/Cross-Appellant in this Court (hereafter "Campaign"). (L.F. 169). The evidentiary record was ordered held open after the conclusion of trial until February 1, 2001 at the request of Respondent Campaign. (L.F. 64). On January 31, 2001, the Respondent Campaign filed and served by facsimile transmission on other parties an "Amended Answer," for the first time raising as an affirmative defense an entirely new legal issue related to the procedural constitutional validity of the enactment of Section 67.1571, RSMo. (L.F. 69 and 83). On February 9, 2001, after the date set for the close of evidence in the case, the trial court granted leave for the Amended Answer of Intervenor to be filed. (L.F. 86). On March 6, 2001, Appellant filed a Motion to Strike as untimely and procedurally defective, the affirmative defense included in the Campaign's Amended Answer. (L.F. 87).

On July 18, 2001, the trial court issued its Memorandum, Order and Judgment. (L.F. 89). That Judgment held inter alia that Section 67.1571, RSMo was invalid. (L.F. 117). The Court denied Appellant's Motion to Strike Intervenors' affirmative defense. (L.F. 118). The court further held that parts of the "Living Wage" Ordinance was a minimum wage law preempted by state law, that it was vague to the point of violating constitutional due process of law, that it unlawfully created a private right of action in circuit court, and that the invalid

provisions of the ordinance were not severable. (L.F. 138-139).

On August 17, 2001, the City of St. Louis filed a Motion to Amend the Judgment. (L.F. 144). That Motion was not ruled upon and was therefore denied, and on November 20, 2001, Appellant filed its Notice of Appeal to this Court. (L.F. 148). On November 30, 2001, Respondent/Cross-Appellant City of St. Louis and Respondent/Cross-Appellant St. Louis Living Wage Campaign filed their Notices of Cross-Appeal. (L.F. 153 and 160).

## POINTS RELIED ON

I.

The trial court erred in declaring that Section 67.1571 violated the procedural enactment provisions of Article III, Sections 21 and 23 of the Missouri Constitution because the statute of limitations had run on assertion of this claim, in that Section 516.500 provides that any action alleging a procedural defect in the enactment of a statute must be brought no later than the adjournment of the next session of the General Assembly after the effective date of such statute, and the claim regarding Section 67.1571 is barred because it was brought more than two full years after the date of its enactment.

Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994)

Butler v. Mitchell-Hugebach, Inc., 895 S.W.2d 15 (Mo. banc 1995)

Section 516.500, RSMo 2000

#### POINTS RELIED ON

II.

The trial court erred in denying Appellant's Motion to Strike Affirmative Defense and in allowing the claim of constitutional procedural defect to be pled, because the affirmative defense of the unconstitutionality of Section 67.1571 was not raised in a timely manner, in that a question of constitutionality is required to be raised at the earliest opportunity in the case below; the constitutional issue here was not raised at the earliest possible time, but was first raised after the close of all evidence; and this procedure violated the Rules of Court and effectively denied Appellants fair notice and opportunity to respond to the defense based on the constitutionality of the statute.

Christiansen v. Fulton State Hospital, 536 S.W.2d 159 (Mo. banc 1976)

Murphy v. Timber Trace Association, 779 S.W.2d 603 (Mo. App. W.D. 1989)

ITT Commercial Finance v. Mid-America Marine, 854 S.W.2d 371 (Mo. banc 1993)

### **POINTS RELIED ON**

### III.

The trial court erred in declaring that Section 67.1571 violated the procedural enactment provisions of Article III, Sections 21 and 23 of the Missouri Constitution because Section 67.1571 did not add any new or additional subjects to House Bill 1636, in that the legislative prohibition on local minimum wage ordinances was related to and germane to the local jobs creation and economic development purpose of House Bill 1636.

*Stroh Brewery v. State*, 954 S.W.2d 323 (Mo. banc 1997)

C. C. Dillon Company v. City of Eureka, 12 S.W.3d 322 (Mo. banc 2000)

Westin Crown Plaza Hotel, 664 S.W.2d 1 (Mo. banc 1984)

# STANDARD OF REVIEW

An appeal on the issue of constitutionality of a statute is a question of law and this Court reviews the trial court's judgment de novo. *Baldwin v. Director of Revenue*, 38 S.W.3d 401, 405 (Mo. banc 2001).

#### **ARGUMENT**

I.

The trial court erred in declaring that Section 67.1571 violated the procedural enactment provisions of Article III, Sections 21 and 23 of the Missouri Constitution because the statute of limitations had run on assertion of this claim, in that Section 516.500 provides that any action alleging a procedural defect in the enactment of a statute must be brought no later than the adjournment of the next session of the General Assembly after the effective date of such statute, and the claim regarding Section 67.1571 is barred because it was brought more than two full years after the date of its enactment.

The affirmative defense alleging that Section 67.1571, RSMo, violated the procedural enactment provisions of the Missouri Constitution was not properly before the trial court because its assertion was barred by the statute of limitations. Respondents/Cross-Appellants Living Wage Campaign, et al. (the "Campaign") was barred from presenting this defense, since the statute of limitations on presenting it had run. The trial court erred in denying Appellant's Motion to Strike this claim from the Amended Answer on statute of limitations grounds. Thus the trial court should not have invalidated Section 67.1571 on grounds not properly before the Court. The trial court should have rejected the affirmative defense of constitutional procedural defect on the basis that it was barred by the statute of limitations. Thus, this Court should reverse the decision of the Circuit Court invalidating Section 67.1571 on constitutional grounds.

The applicable statute of limitations for bringing a challenge to the procedural regularity of enactment of statutes was first created in 1994 in the case of *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994). Speaking for a four judge majority, Judge Holstein recognized the need for a limitation in regard to challenges based solely on procedural defect in passage of legislation and stated "an attack on a statute for such defects must be filed no later than the adjournment of the next full regular legislative session following a bill's effective date as law." *Id.* at 105. The Campaign's own witness, Representative James Foley, testified that he and his fellow representatives were specifically aware of the claim of defect in the passage of Section 67.1571 at the time of its passage in 1998. (Defendant/Intervenor's Exhibit 3, paragraph 5.) The limitation period, beginning on the effective date of law running to the last day of session, began to run on August 28, 1998.

Subsequent to this Court's decision in *Hammerschmidt*, the General Assembly followed this Court's lead and enacted a statute of limitations which patterned that formulated in *Hammerschmidt*.

No action alleging a procedural defect in the enactment of a bill into law shall be commenced, had or maintained by any party later than the adjournment of the next full regular legislative session following the effective date of the bill as law, unless it can be shown that there was no party aggrieved who could have raised the claim within that time. In the latter circumstance, the complaining party must establish that he or she was the first

person aggrieved or in the class of first persons aggrieved, and that the claim was raised not later than the adjournment of the next full regular legislative session following any person being aggrieved. In no event shall an action alleging a procedural defect in the enactment of a bill into law be allowed later than five years after the bill or the pertinent section of the bill which is challenged becomes effective.

Section 516.500, RSMo 2000.

As is clear from the provisions of this statute of limitation, Respondents' challenge to Section 67.1571 had to be brought before the adjournment of the next full regular legislative session following the effective date of the law. Section 67.1571 was effective on August 28, 1998. The next full regular session of the General Assembly convened in January 1999 and adjourned the last day of May 1999. Defendants did not raise their claim of invalidity until January 31, 2001, more than 1½ years after the statute of limitations had run on their claim.

The Campaign was clearly out of time by failing to bring an action before the end of the 1999 regular session of the General Assembly, and therefore, the trial court was without jurisdiction to review the time-barred claim of procedural irregularity presented by the Campaign in its Amended Answer. See, e.g., *National Credit Associates, Inc. v. Tinker*, 401 S.W.2d 954 (Mo. App. K.C. 1966). Appellants raised the issue of statute of limitations to the Court by Motion to Strike. The trial court erred in overruling that Motion and in its judgment

invalidating Section 67.1571. The trial court's decision finding Section 67.1571 as violative of the Missouri Constitution should therefore be reversed by this Court.

The trial court observed that the Campaign were the first persons aggrieved by the application of Section 67.1571. (L.F. 119). However, the trial court's finding was not based upon any pleading filed by the Campaign, nor was any evidence supporting such assertion adduced before the Court. The affirmative defense belatedly raised by the Campaign made no mention of them being the first persons aggrieved by enactment of Section 67.1571, nor did it even state when or how they became aware of their aggrievement. (L.F. 83). Instead, the evidence presented by the Campaign shows that they knew of their claim of alleged procedural defects at the time of passage.

"I and other legislators believed that the amendment would therefore likely be deemed invalid and unenforceable since it violated the well known "Hammerschmidt" rule - the Missouri Constitution's requirement that bills enacted by the legislature may address only a single subject which must be clearly expressed in the bill's title."

Affidavit of Representative James Foley, Defendant/Intervenor's Exhibit 3, paragraph 5.

It is not credible to suggest that "the Campaign" was the "first party" to be aggrieved by this statute, or to argue that there was no one aggrieved by this statute who could have raised the claim of constitutional procedural defect, when simultaneously with its enactment into law agents of the Living Wage Coalition <a href="mailto:knew">knew</a> of the alleged defect. Certainly, if the claim was

known to an elected representative of those who might be affected Assistant Majority Leader of the House James Foley - - a showing that no one could have raised the challenge within the time allowed in Section 516.500 <u>cannot</u> be made.

Moreover, no such exception from the statute of limitations in Section 516.500 is available in this case. Any party seeking to fit within an exception to a statute of limitations must plead and prove that exception. *Woodruff v. Shores*, 190 S.W.2d 994, 995 (Mo. 1945). Failure to do so prevents the trial court from addressing the claim. Here, the Campaign utterly failed to make any allegations or plead or provide any facts that would extend the statute of limitations by reliance on an exception.

#### As this Court recently stated:

The General Assembly is presumptively aware of this Court's prior decisions establishing rules for construing statutes of limitation and their exceptions. Statutes of limitation are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within a claimed exception. *Hunter v. Hunter*, 237 S.W.2d 100, 104 (Mo. 1951). Statutory exceptions are strictly construed and are not to be enlarged by the courts

The trial court stated that there was "no need for additional evidence," though none had previously been referred to or submitted in support of the claim of unconstitutionality. (L.F. 86). This precluded any factual inquiry into the statute of limitations issue, including applicability of its exceptions, by any party.

upon consideration of apparent hardship. *Id.* 

Butler v. Mitchell-Hugebach, Inc., 895 S.W.2d 15; 19-20 (Mo. banc 1995). See also Shelby County v. Bragg, 135 Mo. 291, 36 S.W. 600, 602 (Mo. 1896).

The appellate courts of this state have also consistently and uniformly adhered this announced principle. See *Kellog v. Kellog*, 989 S.W.2d 681, 685 (Mo. App. E.D. 1999). The statute of limitations may not be extended; and any individual seeking to avoid the statute of limitations must strictly fall within an exception specified in the statute of limitations. *Id.* citing *Woodruff v. Shores, infra*.

At no point in any pleading, in any evidence, or in any manner did the Campaign or any party demonstrate that they fell within an exception to the statute of limitations in Section 516.500. The burden was squarely upon them to do so. *Woodruff*, 190 S.W.2d at 995. The Campaign failed in that burden and thus the statute of limitations must be applied against them. The trial court failed to do so in its decision and this Court should reverse that erroneous decision by application of the statute of limitations. Statutes of limitations are jurisdictional, and if a statute has run the trial court has no jurisdiction to hear a claim raised outside of the statute of limitations. Thus, the trial court had no jurisdiction to address the Campaign's claim regarding the validity of Section 67.1571. This Court should therefore reverse the trial court's decision invalidating Section 67.1571 on constitutional procedural grounds.

The trial court erred in denying Appellant's Motion to Strike Affirmative Defense and in allowing the claim of constitutional procedural defect to be pled, because the affirmative defense of the unconstitutionality of Section 67.1571 was not raised in a timely manner, in that a question of constitutionality is required to be raised at the earliest opportunity in the case below; the constitutional issue here was not raised at the earliest possible time, but was first raised after the close of all evidence; and this procedure violated the Rules of Court and effectively denied Appellants fair notice and opportunity to respond to the defense based on the constitutionality of the statute.

a.

#### FAILURE TO TIMELY RAISE THE CONSTITUTIONAL ISSUE

The Campaign failed, as required, to raise the constitutionality of Section 67.1571, RSMo, at the earliest possible time, and has therefore waived reliance on any such defense. The Campaign did not raise the affirmative defense in its Answer filed in December 2000, and although aware of the claim, did not assert it until the close of the evidence in the case. (L.F. 83). Missouri courts have been clear that attacks on the constitutionality of statutes are disfavored and such an attack must be raised at the <u>earliest possible time</u> or it is deemed waived. Since the Campaign did not raise this defense in a timely manner it is deemed waived. The trial court erred in even considering that affirmative defense. Because the trial court nevertheless did address the claim, this Court should reverse the trial court's decision and

strike this untimely claim from the case.

Failure to timely raise a constitutional issue at the very first opportunity waives that issue. This Court so stated in *Christiansen v. Fulton State Hospital*, 536 S.W.2d 159, 160 (Mo. banc 1976):

We hold that appellant did not comply with the well recognized rule which requires the constitutional issue be raised at the earliest opportunity and thereafter preserved.

In *Christiansen*, the attorney for the Appellant raised the constitutionality issue at the end of the trial. *Id.* This Court found that the issue was not properly raised in a timely manner, and therefore, "no constitutional issue is presented and we have no jurisdiction of this appeal." *Id.* Similarly, the Respondent Campaign did not raise its constitutional claim in defense until the end of the trial. Thus, the defense was not timely raised and the trial court should not have addressed the issues presented in such defense. Under the holding of *Christiansen*, the trial court had no jurisdiction to rule on the constitutionality of Section 67.1571, RSMo, and this Court should therefore reverse the decision of the trial court.

This strict rule of requiring timely raising of constitutional issues at the earliest opportunity has been followed by the other appellate courts. In *Murphy v. Timber Trace Association*, 779 S.W.2d 603 (Mo. App. W.D. 1989), the Western District stated:

To engage adjudication and then review of a constitutional question, however, the issue must be presented at the earliest possible moment that good pleading and orderly procedure admit

under the circumstances of the case; otherwise, it is waived.

*Id.* at 606. That Court expounded upon this principle, citing the history of this Court's decisions, and stating that where constitutionality was first raised during questioning of witnesses at trial:

Plaintiffs do not explain how this casual, even flippant, response on an issue the petition never posed accords under the circumstances as that 'orderly procedure' good practice imposes to present the constitutional question at the 'earliest possible moment.' *Century 21 v. City of Jennings*, 700 S.W.2d [809] at 810 [1, 2] (Mo. banc 1985).

Id. A Reply is too late in proceedings for a party to question the constitutional authority under which a defendant acted. *Bryder v. Julian*, 365 Mo. 313, 282 S.W.2d 484, 497 [21-23] (banc 1955). Nor will an agreed stipulation in lieu of a timely pleading serve to raise a constitutional issue. *State ex rel. Eagleton v. Patrick*, 370 S.W.2d 254, 260 [9, 10] (Mo. 1963). Thus, even the principle that issues not raised by the pleadings, but tried by the consent of the parties, may be adjudicated does not save a constitutional issue not pleaded or otherwise presented at the earliest possible moment in the pleadings. *Id.* Under the "well recognized" timeliness rule, the Campaign's affirmative defense attacking the constitutionality of Section 67.1571 had to be raised in its Answer responding to the Appellants' plain assertion of Section 67.1571 as the primary basis for the relief requested in Count I of the Petition. (L.F. 15). It was not raised; and it was therefore waived. *Id.* 

The Campaign also cannot excuse this failure to timely raise its constitutional claims by resorting to claims of ignorance or excusable neglect under the circumstances. They were aware for months prior to the filing of this litigation that the City itself was relying on Section 67.1571 for positions taken by the Mayor with which the Campaign strongly disagreed. The Campaign had even prepared and filed separate litigation as Plaintiff against the City of St. Louis on the effect of this state statute on the St. Louis Living Wage Ordinance. Their key witness, Representative Foley, advised them long before January 31, 2001, the date the Respondent Campaign first pleaded the issue, that the constitutional procedural defect was believed by Foley and others to exist. There was no lack of knowledge or ignorance of the availability of the defense. It was simply not timely raised. There was no basis for the trial court to deviate from established precedent requiring that constitutional claims be raised at the earliest opportunity. No case, authority or argument excuses the Campaign from application of this well recognized rule. The trial court clearly erred in not enforcing this rule, and its judgment should be reversed.

A long and consistent line of Missouri cases hold that failure to plead constitutional claims at the earliest possible moment entirely waives the defense. That is the exact situation presented in this case. The affirmative defense raising the constitutional issue was not presented at the earliest possible moment, when the Answer was filed, and was in fact held back and not presented until the close of the evidence and the conclusion of the case. Under the express holdings of this Court, such an affirmative defense not timely raised is waived and the trial court has no jurisdiction to consider it. *Christiansen*, 536 S.W.2d at 160. Thus, this

Court should reverse the trial court's decision holding Section 67.1571 violative of the Missouri Constitution.

<u>b.</u>

#### FAILURE TO SPECIFY VIOLATION

Furthermore, the Respondent Campaign's untimely, statutorily barred affirmative defense of unconstitutionality was not properly or sufficiently plead by the Campaign to raise and preserve the issue. The Campaign's one sentence statement of its "defense" was filed at such a late date and contained such a vague and amorphous statement of its claim that Appellant literally had to guess at what arguments might support it, and what arguments could respond to those before the trial court. By failing to set forth facts to support its affirmative defense and to clearly plead the violation alleged to have occurred, as required by court rules, the Campaign's affirmative defense violates the provisions of Rule 55.08; and for that reason the affirmative defense should not have been entertained by the trial court, but should have been stricken as requested by Appellant.

The Campaign failed to properly plead their assertion of a violation of Article III, Sections 21 and 23. The "affirmative defense" stated in the Campaign's Amended Answer does not specify how those constitutional provisions are violated, nor which part of each constitutional provision has been violated. This defense should have been dismissed as violative of and not in compliance with the requirements of Rule 55.08, since it does not "contain a short and plain statement of the facts showing that the pleader is entitled to the defense." Mo. Sup. Ct. Rule 55.08. Failure to adequately plead an affirmative defense requires

that such defense must fail as a matter of law. Stewart Title Guaranty v. WKC Restaurants Company, 961 S.W.2d 874, 884 (Mo. App. W.D. 1998). Stewart is the most recent in a long line of cases requiring adequate pleading of affirmative defenses. In Stewart, the defendants listed various defenses "as conclusory statements, and did not plead any specific facts to support each defense." Id. The Court found that each such affirmative defense must comply with Rule 55.08 or it must fail. Id. This accords with the holdings of this Court on the issue:

Bare legal conclusions, such as those set forth by Everett, fail to inform the plaintiff of the facts relied on and, therefore, fail to further the purposes protected by Rule 55.08.

ITT Commercial Finance v. Mid-America Marine, 854 S.W.2d 371, 383 (Mo. banc 1993). This Court explained that the mandates of Rule 55.08 require a factual basis to be included in any affirmative defense, *Id.* at 383-384, concluding:

We hold that Everett's affirmative defenses as set out above are insufficient as a matter of law. Requiring a 'claimant' to negate such conclusory allegations as a prerequisite to summary judgment would require that party to first make the non-movant's case and then defeat it. Such is often the case under 'notice pleading' but has been purposefully avoided by Missouri's historical adherence to 'fact pleading.'

Id. at 384.

This is the exact situation that occurred in the current case, where the Campaign's

affirmative defense states only that:

Missouri Revised Statute §67.1571 is invalid, as its inclusion in the Community Improvement District Act, House Bill No. 1636 (1998), violates section 21 and section 23 of Article III of the Missouri Constitution.

(L.F. 83).

As can be seen, the Campaign's affirmative defense is purely conclusory. Appellant was forced to literally guess as to what specific facts were being relied upon for the conclusion contained in the affirmative defense and then attempt to refute those facts. This is the exact type of pleading which this and all other appellate courts of this state have tried to avoid through the enforcement of Rule 55.08.

Additionally, Appellant's counsel strongly objected on numerous grounds to the last minute introduction of this constitutional issue into a case that was all but finished, including failure to give any notice to Appellants of the Motion for Leave to Amend, and lack of opportunity to prepare for and receive a hearing on the Motion for Leave to Amend. (Tr. 113-115). The Campaign filed its Motion to Amend on January 31, 2002 and brought it before the Court for ruling the next day, on February 1, 2002. (L.F. 66 and Tr. 110). Rule 44.01 requires at least five days notice to opposing parties for such motions. Less than 24 hours does not comply with this rule. The trial court's decision to nevertheless grant the Campaign's Motion for Leave to File Amended Complaint without sufficient notice and in violation of Rule 44.01 should be reversed by this Court because of the fundamental unfairness of the procedure used,

which deprived Appellant of fair notice and opportunity to respond under the rules.

Further, Appellant timely filed a Motion to Strike Intervenor/Defendants' affirmative defense regarding the constitutionality of Section 67.1571, citing failure to timely raise the issue and the statute of limitations in *Hammerschmidt, supra* and Section 516.500, RSMo. (L.F. 87-88). However, such Motion was erroneously denied by the trial court. This Court should reverse that decision of the trial court and sustain Appellant's Motion to Strike for the reasons herein stated.

In summary, for the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court's decision on the affirmative defense alleging the invalidity of Section 67.1571, RSMo.

The trial court erred in declaring that Section 67.1571 violated the procedural enactment provisions of Article III, Sections 21 and 23 of the Missouri Constitution because Section 67.1571 did not add any new or additional subjects to House Bill 1636, in that the legislative prohibition on local minimum wage ordinances was related to and germane to the local jobs creation and economic development purpose of House Bill 1636.

The trial court held that SCS HS HCS HB 1636, Laws 1998,<sup>2</sup> violates Article III, Sections 21 and 23 of the Missouri Constitution.<sup>3</sup>

# SCS HS HCS HB 1636 COMPLIES WITH ARTICLE III, SECTION 21 OF THE MISSOURI CONSTITUTION

Article III, Section 21 of the Missouri Constitution states:

The style of the laws of this state shall be: "Be it enacted by the general assembly of the state of Missouri, as follows." No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose. Bills may originate in

All legislative actions occurred during the 1998 session of the General Assembly.

The Campaign's affirmative defense did not explain or state which section was violated, how or why. For completeness, Appellant will address both sections of Article III referred to.

either house and may be amended or rejected by the other. Every bill shall be read by title on three different days in each house.

Mo. Const., Art. III, Section 21.

The original HB 1636, introduced by Representative Hoppe, was entitled:

An Act to Repeal Sections 67.1400, 67.1410, 67.1420, 67.1430, 67.1440, 67.1450, 67.1460, 67.1470, 67.1480, 67.1490, 67.1500, 67.1510, 67.1520, 67.1530, 67.1540, 67.1550 and 67.1560 relating to community improvement districts, and to enact in lieu thereof nineteen new sections relating to the same subject.

SCS HS HCS HB 1636 as finally passed included nearly all of the original provisions of HB 1636 and also contained the provision now codified at Section 67.1571.

Article III, Section 21 is a procedural limitation. *Stroh Brewery v. State*, 954 S.W.2d 323, 325 (Mo. banc 1997). "The use of procedural limitations to attack the constitutionality of statutes is not favored." *Id.* at 326. Procedural limitations are construed liberally and this Court must uphold the constitutionality of the statute unless the act "clearly and undoubtedly violated the constitutional limitation." *Id.* quoting *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994).

This Court has described the heavy burden undertaken in procedural attacks on legislation in a case turning back a procedural challenge very similar to the current attack:

We begin our analysis of plaintiffs' points by recalling several principles of constitutional interpretation. A statute has a presumption of

constitutionality...The party challenging the constitutionality of a statute must plead facts in support of the attack,...and the burden of proof is on the party attacking the statute...Finally, we note that we are to resolve all doubt in favor of the acts' validity...and in doing so we are allowed to make every reasonable intendment to sustain the constitutionality of a statute.

Westin Crown Plaza Hotel, 664 S.W.2d 1, 5 (Mo. banc 1984). (Citations omitted.)

Westin, and every other case on Section 21 since 1984, stand for the clear proposition that a statute is intended to be constitutional and that the presumption is that a duly enacted statute is constitutional. In all constitutional challenges, the party asserting unconstitutionality must carry the burden of proof to overcome the presumption of constitutionality. If there is any question as to the constitutionality of the statute, such uncertainty is to be resolved in favor of validity of the enactment. Mere uncertainty is insufficient to overcome the presumption of the validity of a statute.<sup>4</sup>

Westin specifically discussed the purpose of Article III, Section 21.

"[T]he restriction is against the introduction of matter 'not germane to the object of legislation or unrelated to its original subject,' alterations which bring about an extension or limitation of scope of a bill are not prohibited, even new matter is not

On appeal, the issue of constitutionality is reviewed de novo by this Court. Thus, the presumption of constitutionality survives despite the trial court's ruling to the contrary.

excluded, if germane." *State v. Ludwig*, 322 S.W.2d [841] at 847 [Mo. banc 1959.]

Westin at 5-6. Adding provisions to legislation that repeal or amend additional statutory sections does not violate Section 21. Stroh Brewery at 326 (citing Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 38 (Mo. banc 1982). No evidence sufficient to carry the substantial burden of proving unconstitutionality was presented to the trial court, yet the trial court still found a constitutional violation. No analysis of this Court's decisions on the issue of procedural constitutional requirements was performed by the Circuit Court in reaching its decision that Section 67.1571 was unconstitutional. That decision of the Circuit Court was without basis and was in error. Such decision should be reversed.

This Court was presented with a challenge very similar to that brought by the Campaign here in *Stroh Brewery v. State*, 954 S.W.2d 323 (Mo. banc 1997), where the Court found that the amendments in that case were constitutional under Article III, Section 21. This Court emphasized the general rule that a law must be presumed constitutional, and that the procedural requirements of the Constitution are not intended as a legislative straightjacket.

Article III, Section 21 was not designed to inhibit the normal legislative processes, in which bills are combined and additions necessary to comply with the legislative intent are made.... The restriction is against the introduction of matter that is not germane to the object of the legislation or that is unrelated to its original subject. Alterations that bring about an extension or

limitation of the scope of the bill are not prohibited: even new matter is not excluded if germane.

*Id.* at 326.

This Court again reviewed this constitutional provision in the case of *C. C. Dillon Company v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000). In *Dillon*, this Court specified that the burden under Article III, Section 21 is on the challenger to demonstrate that the subject of an amendment is "clearly and undoubtedly not germane" to the subject of the bill. *Id.* at 327. In *Dillon*, the challenge was brought to a provision regarding billboards which had been amended into a bill relating to "transportation." This Court found, based upon evidence and explanation of germaneness of the amendment to the subject, that billboards are sufficiently related to transportation, and thus were germane and did not violate the provisions of Article III, Section 21.

In the current case, the original purpose of the bill related to creation of local Community Improvement Districts (CID's), under a state authorized system of financial incentives to be used to bring jobs to blighted areas of cities. Since the main thrust, indeed the <u>primary purpose</u>, of the community improvement district legislation was job creation, an obvious issue of legislative concern was the wages to be paid for those jobs created. Whether more jobs at wages determined by the market, or fewer jobs at "living wages" determined by local jurisdictions, should be pursued under the CID program is a matter directly related to and germane to the job creation purposes of the legislation.<sup>5</sup> Under the authority of *C. C. Dillon*,

<sup>&</sup>lt;sup>5</sup> Because Respondent Campaign did not raise the issue of procedural

*supra*, just as billboards are related to transportation, wages (especially minimum wages) are related to job creation incentives through Community Improvement Districts. *C. C. Dillon* is dispositive on this claim.

Under the above standards, the trial court's decision should be reversed with respect to the finding that Section 67.1571 was enacted in violation of Missouri Constitution, Article III, Section 21. The original purpose of HB 1636 was economic development and job creation through use of state economic incentives in Community Improvement Districts, which are state sponsored local job creation programs. This Court's analysis and holdings in *Stroh Brewery*, which upheld SB 933, and in *Dillon*, which upheld SB 883, are controlling authority in this case. This Court should uphold Section 67.1571 in this case and reverse the decision of the Circuit Court of St. Louis City on this issue.

# SCS HS HCS HB 1636 COMPLIES WITH ARTICLE III, SECTION 23 OF THE MISSOURI CONSTITUTION

The trial court's decision also appears to be based on a related procedural provision,

Article III, Section 23 of the Missouri Constitution. For reasons similar to those discussed

constitutional compliance until the evidentiary record had closed, Appellants were unable to provide evidence (which they possessed) verifying that the minimum wage restrictions of Section 67.1571, RSMo, were amended into HB 1636 for this stated reason - - legislators did not want state incentives for job creation among the lower-paying employment openings created to be limited by hiking the minimum wage paid, or otherwise artificially inflating wage levels at state expense.

above, this decision is also erroneous, and should be reversed by this Court.

Article III, Section 23 states as follows:

No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in Section 37 of this Article and general appropriation bills, which may embrace the various subjects and accounts for the moneys are appropriated.

Mo. Const., Art. III, Section 23. The trial court did not find that the title of the bill, as finally passed, did not clearly express the subject of the bill as required in Article III, Section 23. However, the trial court found, under Article III, Section 23, that the bill contained multiple subjects. This finding is erroneous and should be reversed.

As noted with regard to analysis under Article III, Section 21, this Court must, for the purpose of this case, presume that the statute is constitutional. The party challenging the statute carries the burden to prove that the statute violates Article III, Section 23. If a question exists as to whether the act complies with the Constitution, the uncertainty should be resolved so as to find the act constitutional. *Stroh Brewery*, 954 S.W.2d at 325-26. "This court interprets constitutional limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act clearly and undoubtedly violates the constitutional limitation." *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994).

This Court, in *C. C. Dillon Company v. City of Eureka, supra*, also evaluated a multiple subject challenge based on Article III, Section 23 of the Missouri Constitution. The Court

quoted *Stroh*:

The test to determine if a bill contains more than one subject is whether all provisions of the bill fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose.

C. C. Dillon, 12 S.W.3d at 328 quoting Stroh, 954 S.W.2d at 327.

In *Dillon*, the plaintiffs asserted that adding billboard rules to a transportation bill created multiple subjects. *Id.* at 329. This Court found that such multiple subject assertion was the same as the argument made under Article III, Section 21. The answer was therefore the same: billboards were germane to transportation. *Id.* This argument is presented here with respect to the minimum wage restriction in HB 1636, and the same analysis and holding is appropriate in this case; wages are germane to employment.

The purpose of local Community Improvement Districts (CID) is job creation. It was not the legislative purpose in allowing local communities the use of CID's to restrict the number of jobs created by artificially increasing the salaries in those jobs by fiat, thereby creating fewer of them. It was strongly felt by a majority of state legislators that it is oxymoronic to allow the state's economic development authority and financial resources to be utilized locally to create jobs, while at the same time allowing a local government to use those resources and authority to restrict the number of jobs by inflating (in fact, doubling) the wages required to be paid with respect to those jobs. The legislature removed local government authority to set higher wage levels using the state government's authority and

money. Such was the purpose, indeed the necessity, of the minimum wage restriction contained in HB 1636. There can be no legitimate argument that the General Assembly may not pursue this purpose, and there is no question that such purpose is germane to the subject of community improvement districts in HB 1636.

Such prohibition on local minimum wages which are higher than the state minimum wage is clearly related to the purpose of the Community Improvement District Act. Since the minimum wage restriction is germane to, is an incident of, and provides a critical means of accomplishing the purpose of the state in authorizing use of CID's, the Community Improvement District Act in all of its sections easily withstands challenge under Article III, Sections 21 and 23. *C. C. Dillon* and *Stroh Brewery, supra*, are directly analogous cases which should be controlling in this Court's decision upholding Section 67.1571.

Based upon the strong presumption that SCS HS HCS HB 1636 complies with Article III, Sections 21 and 23 of the Missouri Constitution and this Court's authoritative rulings in nearly identical previous cases, the trial court's decision invalidating Section 67.1571, RSMo, should be reversed; and this Court should hold that Section 67.1571, RSMo is constitutional and valid in all respects.

## **CONCLUSION**

The trial court erred in its decision that Section 67.1571 violated the procedural limitations in Article III, Sections 21 and 23 of the Missouri Constitution. The trial court initially erred in not finding the Respondent Campaign's constitutional claims to be barred by the expiration of the statute of limitations, created by this Court and codified by the General

Assembly in Section 516.500, RSMo. The claim was not raised until January 31, 2001, while Section 67.1571 was enacted and became effective August 28, 1998. *Hammerschmidt* and Section 516.500 mandate that such claims be brought prior to the adjournment of the next session of the General Assembly after the effective date of the statute in question. The statute therefore ran out on Respondent Campaign's claim of procedural constitutional defect on May 30, 1999. The claim was not timely filed, and thus the trial court had no jurisdiction to address the claim. Therefore, this Court should reverse the trial court's decision.

Further, the trial court erred in considering the affirmative defense placed before it because it was procedurally untimely under the rules of Court and improperly pled. Affirmative defenses, on which the pleader bears the burden of proof, must be pled with some particularity pursuant to Rule 55.08. The affirmative defense consisted of one sentence, which did not specify any facts or provide any particularity. The Amended Answer asserting the defense was presented and ruled upon without sufficient notice under Rule 44.01. Furthermore, this Court has consistently held that defenses raising the constitutionality of a statute must be raised at the earliest possible moment. This affirmative defense was not raised until the very last possible moment - - at the point of final submission to the Court for decision. The claim is therefore untimely and is waived. For these further and additional reasons, this Court should reverse the trial court.

Finally, the trial court erred in holding Section 67.1571 to be violative of Article III, Sections 21 and 23, when in fact it clearly is not. Section 67.1571 did not change the purpose of the original HB 1636, nor did the addition of Section 67.1571 did create multiple subjects

within the truly agreed to and finally passed version of HB 1636. Therefore, this Court should reverse the trial court's holding that Section 67.1571 is invalid; declare that Section 67.1571 is valid; and enter judgment that Ordinance 65045 violates Section 67.1571, RSMo, and such Ordinance is therefore invalid.

Respectfully submitted,

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## **CERTIFICATE OF ATTORNEY**

I hereby certify that the foregoing Brief complies with the provisions of Special Rule No. 1(b), and that:

- (A) It contains 8,146 words, as calculated by counsel's word processing program;
- (B) A copy of this Brief is on the attached 3 1/2" disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

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#### **CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the above and foregoing document were sent U.S. Mail, postage prepaid, to the following parties of record on this 26th day of April, 2002:

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